93-919

No. 2

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

LINDA WHITMORE,

Petitioner

vs.

BOARD OF EDUCATION OF DEKALB COMMUNITY SCHOOL DISTRICT NO. 428, JOHN REY, President of Board of Education School District No. 428, Individually, BERNARD LOONEY, Principal, Individually, DR. JACK DEERE, District Superintendent, Individually, KEN KENNEDY, Assistant Principal, Individually, and ROBERT WILLIAMS, Assistant Superintendent, Individually,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 4, 1993.

Before

Hon. JOHN L. COFFEY, Circuit Judge

Hon. KENNETH F. RIPPLE, Circuit Judge

Hon. JESSE E. ESCHBACH, Senior Circuit Judge

LINDA WHITMORE, Plaintiff-Appellant,	Appeal from the United States District Court for the Northern District of Illinois, Western Division.
No. 92-2442 v.	
BOARD OF EDUCATION OF DEKALB COMMUNITY SCHOOL DISTRICT NO. 428, individually, BERNARD LOONEY, Principal, individually, et al.,	No. 90 C 20143
	Philip G. Reinhard, Judge.
Defendants-Appellees.	

ORDER

Linda Whitmore appeals from the district court's denial of her motion to reconsider under Federal Rule of Civil Procedure 60. We affirm.

I

Whitmore, a high school teacher, sued the DeKalb school board and various school district

officials after the board voted not to renew her contract. She sought relief pursuant to 42 U.S.C. §§ 1983, 1985, 2000e-h, as well as under state law for intentional infliction of emotional distress.

The district court granted in part and denied in part the defendants' motion under Federal Rule of Civil Procedure 12(b)(6). Initially, the court found that Whitmore had not received sufficiently specific reasons for her termination. Subsequently, however, the district court vacated that order and deleted its finding that Whitmore had received tenure under state law.

Another judge took over the case and granted the defendants' motion for summary judgment as to all of Whitmore's claims. She then filed a "motion to reconsider" the summary judgment pursuant to Federal Rule of Civil Procedure 60(b), but before the time for taking a direct appeal had expired. The district court denied this motion and Whitmore appealed.

II

A motion under Rule 60(b) seeks an extraordinary remedy. Merit Insurance Co. v. Leatherby Insurance Co., 714 F.2d 673, 683 (7th Cir.), cert. denied, 464 U.S. 1009 (1983). That is especially true under Rule 60(b)(6). Although this "catch-all provision", id., authorizes the district court to vacate its order or judgment for "any reason justifying relief from the operation of the judgment", Rule 60(b)(6) is not as open-ended as its language or nickname suggest. Relief is available only (1) if Rules 60(b)(1) through (5) do not apply; and (2) if the district court, in its sound discretion, finds that equitable action is necessary to accomplish justice. Peacock v. Board of School Comrs., 721 F.2d 210, 214 (7th Cir. 1983) (per curiam). These conditions will obtain only in "extraordinary circumstances that create a substantial danger that the underlying judgment was unjust." Margoles v. Johns, 798 F.2d 1069, 1073 (7th Cir. 1986), cert. denied,

482 U.S. 905 (1987); C.K.S. Engineers, Inc. v. White Mountain Gypsum Co., 726 F.2d 1202, 1204-05 (7th Cir. 1984)("the general rule in this circuit is that relief from a judgment under [R]ule 60(b) is an extraordinary remedy and is granted only in exceptional circumstances."). Cf. Pioneer investment Services Co. v. Brunswick Assocs. Ltd. Partnership, 113 S.Ct. 1489, 1497 (1993).

Our cases emphasize that Rule 60(b) is a substitute neither for direct appeal nor for a motion under Rule 59. In Parke-Chapley Construction Co. v. Cherrington, 865 F.2d 907 (7th Cir. 1989), for instance, Judge Cummings explained the rationale for this limitation on Rule 60(b):

> If plaintiff believed the district court was mistaken as a mater of law in dismissing the original complaint, he should have appealed . . . or he might have filed a timely motion under FRCP 59 to vacate the judgment of dismissal and for leave to amend his complaint . . . The policy behind such a reading of FRCP 60(b) is clear; parties should not be allowed to escape the consequences of their failure to file a timely appeal by addressing questions of law to the trial

> court for reconsideration. That is the function of appellate courts. If allowed to raise the same questions in a FRCP 60(b) motion that would have been raised in an appeal from the merits, a party would be able to effect an indirect extension of the time for appeal by appealing the FRCP 60(b) motion within thirty days of its disposition.

Id. at 915 (quotations and citations omitted).

The function of Rule 60(b) necessarily narrows the scope of this court's review to a "most limited" consideration. Reinsurance Company of America, Inc. v. Administratia de Stat, 902 F.2d 1275, 1277 (7th Cir. 1990). Regardless of whether "relief from the judgment might have been obtained had an appeal been taken", Parke-Chapley Construction Co., 865 F.2d at 915 (quotation and citation omitted), the court may consider only whether the district court abused its discretion. In the absence of extraordinary circumstances, reaching the merits of the underlying judgment

is not permissible. Lee v. River Forest, 936 F.2d 976, 979 (7th Cir. 1991). Brennan v. Midwestern United Life Insurance Co., 450 F.2d 999, 1003 (7th Cir. 1971)(court's function in reviewing the denial of a Rule 60(b) motion is "not to determine whether the court was substantively correct in entering the judgment from which relief was sought but is limited to deciding whether the judge abused his discretion . . ." in ruling that motion failed to show sufficient grounds for relief)(citations omitted), cert. denied, 450 U.S. 999 (1972).

Whitmore's arguments in favor of her motion fail to satisfy the rigorous standards of Rule 60(b). The district court found that Whitmore's motions contained no grounds justifying relief under subsection (1) (mistake, inadvertence, surprise, or excusable neglect), or under subsection (2) (newly discovered evidence that could not have been discovered by due diligence in time to move for

a new trial). Moreover, the district court judge concluded that Whitmore was not entitled to relief under subsection (6). In reaching this conclusion, the district court neither committed an error of law nor exceeded permissible bounds of judgment.

Whitmore fails to argue on appeal what she needs to show: that the district court abused its discretion. Instead, she appears to be challenging the district court's order granting summary judgment, presenting her arguments as through this court were engaged in de novo review of a question of law. Our review of the denial of a motion under Rule 60(b)(6) in certain circumstances will require us to consider the merits underlying a summary judgment. But whitmore seems to think that there was a substantial danger that this underlying judgment was unjust because the judge who granted the summary judgment reached what her lawyer characterized at oral argument as a different conclusion than the first judge.

There are at least three things wrong with this description of events.

The two judges, first of all, were not engaged in the same type of review. So it is not surprising that they could have reached "different conclusions." The first judge considered the defendants' motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). The second judge entertained the defendants' motion for summary judgment. A court's consideration of whether a complaint states a legal claim versus its determination whether the absence of a material issue of fact entitles a party to judgment easily can lead to different conclusions. Many a complaint--this one, for instance--clears the hurdle of a Rule 12(b)(6) motion only to succumb to a motion for summary judgment. If one judge happens to deny the 12(b)(6) motion and another grants summary judgment, neither one nor the other need have reached "the wrong result."

but the judges here did not, as whitmore alleges, reach different legal conclusions. In granting in part and denying in part the motion under Rule 12(b)(6), the first judge initially found that Whitmore was not given sufficiently specific reasons for her termination--a requirement under Illinois law. Accordingly, he found her to be tenured as a matter of law. In response, the defendants filed exceptions to that ruling, arguing that they were entitled to present evidence that Whitmore's evaluations provided actual notice of her deficiencies. The district court subsequently struck its original order a premature and entered an amended order that deleted the finding that Whitmore had achieved tenure. That is how matters stood when the second judge assumed control of the case. After considering the pleadings, Judge Reinhard granted summary judgment to the defendants on all claims. His decision held that under Illinois law the performance deficiencies noted in Whitmore's

evaluations, in conjunction with written notice, met the statutory requirements. Accordingly, she was not tenured. This is the very same conclusion arrived at by the first judge after he recognized that he had ruled prematurely on the issue.

Third, even if Whitmore were correct that the two judges reached opposite conclusions, we fail to see how there would be a substantial danger that the last judgment necessarily would be unjust.

Unlike many of the parties in cases we see involving Rule 60(b), Whitmore was not attempting to evade the time limits of direct appeal under Rule 4(a). She filed her motion under Rule 60(b) before the 30-day period for appeal had expired. Since Whitmore in essence is seeking to challenge the district court's conclusions of law in entering summary judgment, she should have filed a direct appeal in a timely manner. Rule 60(b)(6) does not allow her attorney to undo his strategic

mistakes.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

LINDA WHITMORE, Plaintiff,	)	
v.	)	No. 90-C-20143
BOARD OF EDUCATION OF DEKALB COMMUNITY SCHOOL DISTRICT NO. 428, JOHN REY, President of the Board of Education School District No. 428, Individually, BERNARD LOONEY, Principal, Individually, DR. JACK DEERE, District Superintendent, Individually, KEN KENNEDY, Assistant Principal, Individually, and ROBERT WILLIAMS, Assistant Superintendent, Individually,	)	Dated: February 12, 1991
Defendants.	)	

ORDER

Before the court is Defendants' motion to dismiss Plaintiff's complaint. For the reasons set forth in this Order, the court grants in part and denies in part Defendants' motion. Further, the court grants Plaintiff leave to

file an amended complaint within thirty days in accordance with this Order.

BACKGROUND

On May 15, 1990, Plaintiff, Linda Whitmore, filed a complaint in this court against the following Defendants: Board of Education of DeKalb Community School District No. 428 (hereinafter "Board"); and, in their individual capacities, Board President John Rey, Principal Bernard Looney, District Superintendent Dr. Jack Deere, Assistant Principal Ken Kennedy, and Assistant Superintendent Robert William. Plaintiff alleges a cause of action against Defendants under 42 U.S.C. Sections 1983, 1985, 1988 (1988), under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e - 2000h (1988), and also a state law claim of intentional infliction of emotional distress.

The following information is taken from Plaintiff's complaint. Defendant Board employed Plaintiff as a full-time high school teacher form the fall 1987 semester until 1989. In July

1988, Plaintiff was raped and became pregnant as a result of the rape. In November 1988 Plaintiff informed Principal Looney of the rape and pregnancy. Assistant Principal Kennedy and Principal Looney evaluated Plaintiff's teaching performance on three occasions: November 23, 1988; January 6, 1989; and March 2, 1989. In the first two evaluations, Plaintiff was rated in the excellent to superior range, and in the third evaluation she was rated in the satisfactory to excellent range.

On or about March 19, 1989, the Board adopted and passed a resolution dismissing Plaintiff from her employment. On March 29, 1989, Plaintiff was notified of her termination through a letter from Board President Rey. This letter stated that Plaintiff was being terminated because the performance of her duties had failed to meet the District's expectations. On that date, Plaintiff was nine months pregnant and unmarried. Plaintiff was able to secure other employment as a teacher after repeated

efforts over a long period of time.

DISCUSSION

In analyzing a motion to dismiss, this court will not dismiss a complaint unless it is clear there are no set of facts that Plaintiffs could prove consistent with the pleadings that would entitle them to relief. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Murphy v. Lane, 833 F.2d 106, 107 (7th Cir. 1087); Vaden v. Village of Maywood, 809 F.2d 361, 363 (7th Cir.), cert. denied, 482 U.S. 908 (1987). The court will accept all well-pleaded factual allegations in the complaint as true. Vaden, 809 F.2d at 363; Doe v. St. Joseph's Hosp. of Fort Wayne, 788 F.2d 411, 414 (7th Cir. 1986). In addition, this court will view the allegations in a light most favorable to the non-moving party. Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984), cert. denied, 470 U.S. 1054 (1985); Wolfolk v. Rivera, 729 F.2d 1114, 1116 (7th Cir. 1984).

Statute of Limitations

Defendants filed their motion to dismiss on July 5, 1990. Defendants advance several arguments in support of their motion, the first of which is that Plaintiff's complaint is barred by the statute of limitations. Defendants argue that the one-year statute of limitations found in the Illinois Tort Immunity Act applies. Ill.Rev. Stat. ch. 85, para. 8-101 (1989). The Supreme Court's ruling in Owens v. Okure, 488 U.S. 235 (1989(, is the final word on the statute of limitations for Section 1983 actions. The Owens court stated:

> We accordingly hold that where state law provides multiple statutes of limitations for personal injury actions, courts considering Sections 1983 claims should borrow the general or residual statute for personal injury actions.

Id. at _____, 109 S. Ct. at 582.

Therefore, Section 1983 actions brought in Illinois are subject to the one general statute of limitations for personal injury actions. The Seventh Circuit has ruled that Illinois's two-year statute of limitations for personal

injury applies to Section 1983 actions brought in Illinois. Kalimara v. Illinois Dep't of Corrections, 879 F.2d 276, 277 (7th Cir. 1989). The Illinois Code of Civil Procedure provides that personal injury actions shall be brought within two years after the cause of action accrued. Ill. Rev. Stat. ch. 110, para. 13-202 (1989). The court finds that Plaintiff's claims under 42 U.S.C. Sections 1985 and 1988, because they relate to and depend upon, respectively, Plaintiff's Section 1983 claims, are also subject to the two-year statute of limitations.

Defendant does not specifically argue that Plaintiff's Title VII claim is also barred by the statute of limitations. Therefore, the court need not address the timeliness of Plaintiff's Title VII claim.[2] Defendant does

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[2]In Illinois, persons complaining of Title VII violations must file discrimination charges with the Illinois Department of Human Relations within 180 days of the discriminatory act. Haag v. Board of Education, 655 F. Supp. 1267, 1270 (N.D. Ill. 1987).

contend that Plaintiff's pendent state claim for intentional infliction of emotional distress was not timely filed. Defendant implies that the statute of limitations began to run for this claim on March 20, 1989, the date Plaintiff says she received notice of termination from Defendants. Therefore, Defendants argue, Plaintiff missed the one-year statute of limitations because she filed suit on May 15, 1990.

The court rejects Defendants' argument. Plaintiff's pendent state claim alleges an intentional tort: intentional infliction of emotional distress. Plaintiff alleges that Defendants committed this tort by terminating her, and also because "[a]s a direct result of the said dismissal, Plaintiff became the subject of frequent and negative comments and sayings by other employees of Defendant Board." Plaintiff's complaint, filed May 15, 1990, at 11. The Seventh Circuit has ruled that the statute of limitations does not begin to run

for a continuing wrong until the wrong is finished. Taylor v. Meirick, 712 F.2d 1112, 1118 (7th Cir. 1983). Where a tort involves repeated injury, the statute of limitations begins to run on the date of the last injury, or when the tortious activity ends. Gass v. Metro-East Sanitary Dist., 186 Ill. App. 3d 1077, _____, 542 N.E. 2d 1229, 1234, appeal denied, 128 Ill. 2d 663, 548 N.E.2d 1068 (1989). It is reasonable to infer that Plaintiff is alleging that the emotional distress she suffered was a continuing injury, which did not end on March 20, 1989, and that the "frequent and negative comments and sayings" about her extended past that date. Therefore, the court finds that Plaintiff filed her pendent state law claim within the one-year statute of limitations of the Illinois Tort Immunity Act.

Employment Status

Defendants argue that Plaintiff had no

property or liberty interest in continued employment because she was a nontenured, probationary teacher at the time of her dismissal. Defendants allege that the letter informing Plaintiff of her dismissal complied with the requirements of the Illinois School Code of 1961. The relevant portion of the School Code reads:

> Any teacher who has been employed in any district as a full-time teacher for a probationary period of 2 consecutive school terms shall enter upon contractual continued service unless given written notice of dismissal stating the specific reason therefor, by certified mail, return receipt requested by the employing board at least 60 days before the end of such period.

Ill. Rev. Stat. ch. 122, para. 24-11 (1989) (emphasis added).

According to Plaintiff, Defendant Rey's letter to her "stated that the reason for the discharge was, 'the performance' of your duties has failed to meet the District's expectations." Plaintiff's complaint at 5. One Illinois appellate court defined "specific reason", under the portion of the School Code

quoted above, as a reason which fairly apprises the teacher of the alleged deficiency upon which the dismissal is based, and which is sufficiently specific for the teacher to be able to refute the charge. Wade v. Grantie City Community Unit School Dist. No. 9, 71 Ill. App. 2d 34, 36, 218 N.E.2d 19, _____ (1966).

Another Illinois appellate court found to be sufficiently specific a dismissal letter giving the reason "your inability to adequately supervise employees under your control." Howard v. Board of Educ. of Freeport School Dist. No. 145, 160 Ill. App. 3d 309, ____, 513 N.E.2d 545, 547 (1987). The court noted that this notice was sufficient because it "contained a specific reference to plaintiff's supervisory duties", and also because the plaintiff had been advised of his specific performance deficiencies on numerous occasions. Id. at _____, 513 N.E.2d at 547-48. Here, Plaintiff's notice of dismissal made no reference to specific performance deficiencies;

further, she had not been advised of any specific deficiencies prior to her dismissal. Therefore, the "reason" given Plaintiff contains none of the specificity required under Wade and Howard. The court finds that Defendants did not give Plaintiff sufficiently specific reasons for her termination, contrary to the requirements of the School Code. Therefore, Plaintiff was under continued contractual service as of the last day of her employment, and she had a protectable property interest in employment.

Property and Liberty Interests in Employment

As just noted, Plaintiff was no longer a probationary teacher at the end of her employment with Defendant Board. Therefore, Plaintiff possessed a property interest in continued employment as a teacher by virtue of the Illinois School Code, Ill. Rev. Stat. ch. 122, para, 24-11 (1989).

To show that she has been denied procedural due process, Plaintiff must allege that she was

denied notice and/or an opportunity for a hearing, the two elements which are the essence of procedural due process. The court dismisses the portions of Plaintiff's complaint which allege that she was deprived of her property interest in employment without due process of law. However, the court grants Plaintiff leave to amend her complaint to allege specifically how she was denied notice and/or opportunity for a hearing regarding her dismissal.

Plaintiff also claims that Defendants deprived her of liberty interest in employment. The Seventh Circuit has held that only a dismissal that is accompanied by serious public charges of misconduct preventing the employee from obtaining other employment of comparable responsibility may deprive the employee of his or her liberty interest in employment. Jungels v. Pierce, 825 F.2d 1127, 1131 (7th Cir. 1987).

Plaintiff's allegations regarding her liberty interest in employment do not state that the reason for her dismissal was made public, nor

that the reason given was a serious charge of misconduct. Plaintiff alleges only that because Defendants dismissed her, she was unable to secure other employment as a teacher for a long period of time. Therefore, Plaintiff has not met the Jungels test for deprivation of liberty. Accordingly, the court dismisses the portions of Plaintiff's complaint that allege deprivation of liberty interest without due process of law. However, the court grants Plaintiff leave to amend her complaint in accordance with the test in Jungels v. Pierce, 825 F.2d 1127 (7th Cir. 1987).

Equal Protection

Defendants argue that Plaintiff has failed to state a Section 1983 claim for denial of equal protection. A person may state a claim for denial of equal protection by alleging that the government has infringed on a fundamental right. Supreme Court precedent clearly shows that a person's decisions regarding marriage and child bearing represent fundamental rights

which are constitutionally protected from improper state infringement. Paul v. Davis, 424 U.S. 693, 713 (1976) ("matters relating to marriage, procreation, contraception, family relationships, and child rearing and education" are constitutionally protected); Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972) (the right of privacy includes the right of persons, whether married or single, to decide whether to bear children). This court has noted that without question, an unmarried woman has a substantive due process right to conceive and raise her child without unwarranted state intrusion. Eckmann v. Board of Educ. of Hawthorn School Dist. No. 17, 636 F. Supp. 1214, 1218 (N.D. Ill. 1986). Therefore, Plaintiff, an unmarried woman who chose to bear and raise her child, has sufficiently pleaded a claim for denial of equal protection.

Violations of the Bill of Rights

Plaintiff has pleaded that Defendants have deprived her of her rights under the first, fourth, fifth, sixth, ninth, tenth, and fourteenth amendments. In her answer brief to Defendants' motion to dismiss, Plaintiff concedes that the fourth, sixth, and tenth amendments are inapplicable. Therefore, the court dismisses the portions of Plaintiff's complaint which allege a cause of action under the fourth, sixth, and tenth amendments to the U.S. Constitution.

Plaintiff's complaint does not identify in what particular way Defendants violated her rights under the remaining constitutional amendments. Rather, Plaintiff states only generally that Defendants:

> have acted under color of State Law to wrongfully invade WHITMORE'S private life and otherwise to deprive her of her right to privacy free from governmental interference guaranteed by the 1st, 4th, 5th, 6th, 9th, 10th, and 14th Amendments to the Constitution of the United States, and by the Constitution of the State of Illinois.

Plaintiff's complaint at 6.

The only portion of the first amendment which the court can conceive of as applicable is the right "to petition the Government for a redress of grievances." U.S. Const. amend. I. Plaintiff has nowhere alleged that she requested and was denied the opportunity for a hearing concerning her dismissal. The first amendment has been found to confer a right to privacy in speech or association, but not in matters of freedom of choice in the matters of family and marriage. Thus, the court finds that Plaintiff has failed to state a claim under the first amendment. Accordingly, the court dismisses those portions of Plaintiff's complaint which state a cause of action based on the first amendment to the U.S. Constitution. However, as noted on page 7 of this Order, the court grants Plaintiff leave to amend her complaint to allege that she requested and was denied the opportunity for a hearing regarding her termination.

Plaintiff has alleged that Defendants deprived her of a recognized substantive due process right: the right of an unmarried woman to bear and raise a child out of wedlock. The grand jury clause is the only clause in the fifth amendment which the Supreme Court has specifically held is not incorporated into the fourteenth amendment. Therefore, Plaintiff can properly allege that her substantive due process right emanates from the fifth and fourteenth amendments. Further, as described in the above section on Equal Protection, Plaintiff has properly pleaded a cause of action under the equal protection clause of the fourteenth amendment.

Defendants argue that the ninth amendment is inapplicable because of her condition as a pregnant unmarried woman. This is an argument on the merits of Plaintiff's claim, and not an explanation of why the ninth amendment is inapplicable. For the purpose of this motion to dismiss, the court must assume that

Plaintiff's allegations are true. If they are true, then Plaintiff has a cause of action under the ninth amendment right to familial privacy, as articulated in Griswold v. Connecticut, 381 U.S. 479, 484 (1965). Plaintiff asserts the right to decide the composition of her own family; in other words, her decision not to marry, and to raise a child.

Conspiracy under 42 U.S.C. Section 1985

Evidence of a conspiracy is rarely proven directly, and is often proven by circumstantial evidence. Hampton v. Hanrahan, 600 F.2d 600, 621 (7th Cir. 1979), rev'd in part on other grounds, 446 U.S. 754 (1980). However, to survive a motion to dismiss, a claim of civil rights conspiracy must be sufficiently specific. Conclusory allegations alone are insufficient; if they are part of the claim, they must at least be accompanied by supporting factual allegations. Sparkman v. McFarlin, 601

F.2d 261, 265-66 (7th Cir. 1979) (Sprecher, J., concurring), citing Hansen v. Ahlgrimm, 520 F.2d 768 (7th Cir. 1975), and other Seventh Circuit cases so holding.

Plaintiff has alleged that Defendants acted in concert to deprive Plaintiff of equal protection through dismissing her. The concept of intracorporate immunity is inapplicable because Defendant Board has not shown that it is a corporation; because the other Defendants are named in their individual capacities; and because, even if Defendant Board were a corporation, the individual employees of Defendant Board are named as co-conspirators. Cross v. General Motors Corp., 721 F.2d 1152, 1156 (8th Cir. 1983) cert. denied, 476 U.S. 1170 (1986). The court finds that Plaintiff's claim of civil rights conspiracy meets the requirements of the Seventh Circuit, as noted in Sparkman, and also the notice pleading requirements of the Federal Rules of Civil Procedure.

Title VII Damages

Count IV of Plaintiff's complaint seeks redress for violation of Title VII of the Civil Rights Act of 1964. Count IV seeks damages of $1,000,000.00 plus costs and attorney's fees, as well as reinstatement, backpay, and retroactive seniority. Defendants correctly note that Seventh Circuit precedent bars this court from awarding punitive or compensatory damages in Title VII cases. Brooms v. Regal Tube Co., 881 F.2d 412, 423 (7th Cir. 1989). Therefore, the remedy which Plaintiff may seek for Title VII violations is limited to equitable relief.

The court dismisses the portion of Count IV of Plaintiff's complaint which seeks damages of $1,000,000.00. The court presumes that this sum represents Plaintiff's request for punitive or compensatory damages. The court grants Plaintiff leave to amend her complaint to demand the additional equitable relief of backpay. The court allows to stand as pleaded

the portion of Count IV of Plaintiff's complaint which requests an injunction against Defendants. A prevailing party in a Title VII action may, in the court's discretion, be awarded attorney's fees and costs. Brooms, 881 F.2d at 425. Thus, the court allows to stand as pleaded the portion of Count IV of Plaintiff's complaint which requests attorney's fees and costs.

Intentional Infliction of Emotional Distress

Defendants argue that, as a matter of law, Plaintiff has not stated a claim for intentional infliction of emotional distress, because 1) the alleged conduct is not extreme and outrageous, an essential element of the tort; and 2) the Illinois Workers' Compensation Act is the exclusive remedy for the tort. The court rejects both of these arguments.

Illinois law does recognize a cause of action for intentional infliction of emotional

distress. To state a claim for this tort, the plaintiff must plead and prove that the defendant intentionally engaged in extreme and outrageous conduct which caused the plaintiff to suffer sever emotional distress. Clay v. Quartet Mfg. Co., 644 F. Supp. 56, 61 (N.D. Ill. 1986), citing Public Finance Corp. v. Davis, 66 Ill. 2d 85, 360 N.E.2d 765 (1976). In Illinois, the extreme and outrageous nature of the conduct is an essential element of the tort. Baily v. Unocal Corp., 700 F. Supp. 396, 399 (N.D. Ill, 1988). The conduct must be so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency. Public Finance, 66 Ill. 2d at 88, 360 N.E.2d at 767. The relationship of the parties is an important factor in determining whether certain conduct is extreme and outrageous. Bailey, 700 F.Supp. at 399. If the defendant has abused or exploited a relationship, a lower threshold of liability applies. Id., citing Bahr v. Ellis & Robertson, Inc., 1985 WL 3074

(N.D. Ill. 1985).

As noted earlier in this Order, an unmarried woman's decision to bear and raise her child is a fundamental right. If Defendants did, as Plaintiff alleges, terminate her because of her status as an unmarried pregnant woman, then that conduct might be found to be outrageous and extreme. Further, the nature of and circumstances surrounding the "frequent negative comments and sayings" of other employees of Defendant Board might rise to the level of extreme and outrageous conduct. In any event, Plaintiff's allegations of intentional infliction of emotional distress are sufficiently pleaded to meet the liberal standard of notice pleading of the Federal Rules of Civil Procedure. Fed.R.Civ.P.8(a).

Defendants argue that the exclusivity provision of the Illinois Workers' Compensation Act, Ill. Rev. Stat. ch. 48, para. 138 - 138.30 (1989), bars Plaintiff's claim for intentional infliction of emotional distress. As support

for this position Defendants cite Brooms v. Regal Tube Co., 881 F.2d 412, 426 (7th Cir. 1989). Because this is an issue of interpretation of a state statute, this court must follow the state's highest court's ruling on the issue. Less than three months ago, the Illinois Supreme Court spoke to this very question in Meerbrey v. Marshall Field & Co., No. 69652 (Ill. S. Ct. Nov. 30, 1990) (1990 WL 186385). The Meerbrey court held that "[t]he exclusivity provisions [of the Illinois Workers' Compensation Act] will not bar a common law cause of action against an employer, however, for injuries which the employer or its alter ego intentionally inflicts upon an employee or which were commanded or expressly authorized by the employer." Id., slip op. at 7 (citing A. Larson, Law of Workmen's Compensation Section 68.21 (1988)).

In Count V of her complaint, Plaintiff has alleged that two intentional acts of Defendants caused her to suffer emotional distress: 1)

Defendants terminated her employment; and 2) Defendants allowed commentary and dialogue about Plaintiff to continue. The first act is necessarily not "accidental," and the second act might be shown to be not "accidental" on Defendants' part. Plaintiff may seek to prove that Defendants "commanded or expressly authorized" the negative comments or sayings made about Plaintiff by other of Defendants' employees. Such a showing would render Defendants' actions intentional. Thus, the two alleged acts are not conclusively within the exclusive purview of the Illinois Workers' Compensation Act. The court allows Count V of Plaintiff's complaint to stand as pleaded.

Qualified Immunity

Defendants argue that those among them named in their individual capacities are entitled to qualified immunity. The court rejects this argument. To establish personal, or individual, liability in a Section 1983

action, the plaintiff need show only that the officials, acting under color of state law, caused the deprivation of a federal right. Kentucky v. Graham, 473 U.S. 159, 166 (1985). If, as Plaintiff alleges, the individually named Defendants dismissed her based on her status as an unmarried pregnant woman, then they violated Plaintiff's substantive due process rights, and they would therefore have individual liability under Section 1983. Eckmann v. Board of Educ. of Hawthorn School Dist. No. 17, 636 F. Supp. 1214, 1225 (N.D. Ill. 1986). Plaintiff has alleged that all Defendants violated a clearly established constitutional right: the right of an unmarried woman to bear and raise her child. Such an allegation means that the defense of qualified immunity is not available to the individually named defendants. Id. at 1227. Therefore, the court refuses to dismiss the individually named defendants from this action.

Punitive Damages

Punitive damages may be awarded against the individually named defendants if they showed reckless or callous disregard of, or indifference to, Plaintiff's federally protected right to bear and raise her child. Smith v. Wade, 461 U.S. 30, 56 (1983). Therefore, the court allows to stand as pleaded Plaintiff's claim for punitive damages against the individually named defendants.

Governmental entities, including school boards, are immune from punitive damages for Section 1983 liability. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981). Further, the school board is a "local public entity" which, according to the Illinois Tort Immunity Act, is immune from punitive damages. Ill.Rev.Stat. ch. 85, para. 2-102 (1989). Therefore, the court dismisses all portions of Plaintiff's complaint which demand punitive damages against Defendant Board of Education.

Attorneys' Fees Under 42 U.S.C. Section 1988

As this Order has stated, Plaintiff has stated a cause of action against Defendants under 42 U.S.C. Sections 1983 and 1985 (1988). The prevailing party in a suit under either of these two sections may seek an award of attorneys' fees and costs. 42 U.S.C. Section 1988. Therefore, because the court is not dismissing Plaintiff's claims under Sections 1983 and 1985, it allows Plaintiff's claim for attorneys' fees and costs, under Section 1988, to stand as pleaded.

Conclusion

For the reasons set forth in this Order, the court grants in part and denies in part Defendants' motion to dismiss. The court dismisses the following portions of Plaintiff's complaint: allegations that Plaintiff was deprived of her liberty and property interests in employment without due process of law; allegations that Defendants violated

Plaintiff's first amendment rights; the request for damages of $1,000,000.00; and the request for punitive damages against Defendant Board of Education. Further, the court grants Plaintiff leave to file an amended complaint within thirty days, in accordance with this Order, regarding the following allegations: allegations that Plaintiff was deprived of her liberty and property interests in employment without due process of law; allegations that Defendants violated Plaintiff's first amendment rights; and the court grants Plaintiff leave to file an amended complaint to add a demand for the equitable relief of backpay. The court notes that the amended complaint should include all of Plaintiff's claims before the court. The amended complaint should incorporate the viable portions of Plaintiff's existing complaint with the amended portions which this

Order describes.

ENTER:

STANLEY J. ROSZKOWSKI, JUDGE
UNITED STATES DISTRICT COURT

DATED: February 12, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

LINDA WHITMORE, Plaintiff,	)	
v.	)	No. 90-C-20143
BOARD OF EDUCATION OF DEKALB COMMUNITY SCHOOL DISTRICT NO. 428, JOHN REY, President of the Board of Education School District No. 428, Individually, BERNARD LOONEY, Principal, Individually, DR. JACK DEERE, District Superintendent, Individually, KEN KENNEDY, Assistant Principal, Individually, and ROBERT WILLIAMS, Assistant Superintendent, Individually,	)	Dated:May 29, 1991
Defendants.	)	

AMENDED ORDER

Before the court is Defendants' motion to dismiss Plaintiff's complaint. For the reasons set forth in this Order, the court grants in part and denies in part Defendants' motion. Further, the court grants Plaintiff leave to

file an amended complaint within thirty days in accordance with this Order.

BACKGROUND

On May 15, 1990, Plaintiff, Linda Whitmore, filed a complaint in this court against the following Defendants: Board of Education of DeKalb Community School District No. 428 (hereinafter "Board"); and, in their individual capacities, Board President John Rey, Principal Bernard Looney, District Superintendent Dr. Jack Deere, Assistant Principal Ken Kennedy, and Assistant Superintendent Robert William. Plaintiff alleges a cause of action against Defendants under 42 U.S.C. Sections 1983, 1985, 1988 (1988), under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e - 2000h (1988), and also a state law claim of intentional infliction of emotional distress.

The following information is taken from Plaintiff's complaint. Defendant Board employed Plaintiff as a full-time high school teacher form the fall 1987 semester until 1989. In July

1988, Plaintiff was raped and became pregnant as a result of the rape. In November 1988 Plaintiff informed Principal Looney of the rape and pregnancy. Assistant Principal Kennedy and Principal Looney evaluated Plaintiff's teaching performance on three occasions: November 23, 1988; January 6, 1989; and March 2, 1989. In the first two evaluations, Plaintiff was rated in the excellent to superior range, and in the third evaluation she was rated in the satisfactory to excellent range.

On or about March 19, 1989, the Board adopted and passed a resolution dismissing Plaintiff from her employment. On March 29, 1989, Plaintiff was notified of her termination through a letter from Board President Rey. This letter stated that Plaintiff was being terminated because the performance of her duties had failed to meet the District's expectations. On that date, Plaintiff was nine months pregnant and unmarried. Plaintiff was able to secure other employment as a teacher after repeated

efforts over a long period of time.

DISCUSSION

In analyzing a motion to dismiss, this court will not dismiss a complaint unless it is clear there are no set of facts that Plaintiffs could prove consistent with the pleadings that would entitle them to relief. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Murphy v. Lane, 833 F.2d 106, 107 (7th Cir. 1087); Vaden v. Village of Maywood, 809 F.2d 361, 363 (7th Cir.), cert. denied, 482 U.S. 908 (1987). The court will accept all well-pleaded factual allegations in the complaint as true. Vaden, 809 F.2d at 363; Doe v. St. Joseph's Hosp. of Fort Wayne, 788 F.2d 411, 414 (7th Cir. 1986). In addition, this court will view the allegations in a light most favorable to the non-moving party. Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984), cert. denied, 470 U.S. 1054 (1985); Wolfolk v. Rivera, 729 F.2d 1114, 1116 (7th Cir. 1984).

Statute of Limitations

Defendants filed their motion to dismiss on July 5, 1990. Defendants advance several arguments in support of their motion, the first of which is that Plaintiff's complaint is barred by the statute of limitations. Defendants argue that the one-year statute of limitations found in the Illinois Tort Immunity Act applies. Ill.Rev. Stat. ch. 85, para. 8-101 (1989). The Supreme Court's ruling in Owens v. Okure, 109 S. Ct. 153 (1989), is the final word on the statute of limitations for Section 1983 actions. The Owens court stated:

> We accordingly hold that where state law provides multiple statutes of limitations for personal injury actions, courts considering Section 1983 claims should borrow the general or residual statute for personal injury actions.

Id. at 582 _____, 109 S. Ct. at 582.

Therefore, Section 1983 actions brought in

Illinois are subject to the one general statute of limitations for personal injury actions. The Seventh Circuit has ruled that Illinois's two-year statute of limitations for personal injury applies to Section 1983 actions brought in Illinois. Kalimara v. Illinois Dep't of Corrections, 879 F.2d 276, 277 (7th Cir. 1989). The Illinois Code of Civil Procedure provides that personal injury actions shall be brought within two years after the cause of action accrued. Ill. Rev. Stat. ch. 110, para. 13-202 (1989). The court finds that Plaintiff's claims under 42 U.S.C. Sections 1985 and 1988, because they relate to and depend upon, respectively, Plaintiff's Section 1983 claims, are also subject to the two-year statute of limitations.

Defendant does not specifically argue that Plaintiff's Title VII claim is also barred by the statute of limitations. Therefore, the court need not address the timeliness of

Plaintiff's Title VII claim.[3] Defendant does contend that Plaintiff's pendent state claim for intentional infliction of emotional distress was not timely filed. Defendant implies that the statute of limitations began to run for this claim on March 20, 1989, the date Plaintiff says she received notice of termination from Defendants. Therefore, Defendants argue, Plaintiff missed the one-year statute of limitations because she filed suit on May 15, 1990.

The court rejects Defendants' argument. Plaintiff's pendent state claim alleges an intentional tort: intentional infliction of emotional distress. Plaintiff alleges that Defendants committed this tort by terminating her, and also because "[a]s a direct result of the said dismissal, Plaintiff became the

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[3]In Illinois, persons complaining of Title VII violations must file discrimination charges with the Illinois Department of Human Relations within 180 days of the discriminatory act. Haag v. Board of Education, 655 F. Supp. 1267, 1270 (N.D. Ill. 1987).

subject of frequent and negative comments and sayings by other employees of Defendant Board." Plaintiff's complaint, filed May 15, 1990, at 11. The Seventh Circuit has ruled that the statute of limitations does not begin to run for a continuing wrong until the wrong is finished. Taylor v. Meirick, 712 F.2d 1112, 1118 (7th Cir. 1983). Where a tort involves repeated injury, the statute of limitations begins to run on the date of the last injury, or when the tortious activity ends. Gass v. Metro-East Sanitary Dist., 186 Ill. App. 3d 1077, _____, 542 N.E. 2d 1229, 1234, appeal denied, 128 Ill. 2d 663, 548 N.E.2d 1068 (1989). It is reasonable to infer that Plaintiff is alleging that the emotional distress she suffered was a continuing injury, which did not end on March 20, 1989, and that the "frequent and negative comments and sayings" about her extended past that date. Therefore, the court finds that Plaintiff filed her pendent state law claim within the one-

year statute of limitations of the Illinois Tort Immunity Act.

Employment Status

Defendants argue that Plaintiff had no property or liberty interest in continued employment because she was a nontenured, probationary teacher at the time of her dismissal. Defendants allege that the letter informing Plaintiff of her dismissal complied with the requirements of the Illinois School Code of 1961. The relevant portion of the School Code reads:

> Any teacher who has been employed in any district as a full-time teacher for a probationary period of 2 consecutive school terms shall enter upon contractual continued service unless given written notice of dismissal stating the specific reason therefor, by certified mail, return receipt requested by the employing board at least 60 days before the end of such period.

Ill. Rev. Stat. ch. 122, para. 24-11 (1989) (emphasis added).

According to Plaintiff, Defendant Rey's letter to her "stated that the reason for the

discharge was, 'the performance' of your duties has failed to meet the District's expectations." Plaintiff's complaint at 5. One Illinois appellate court defined "specific reason", under the portion of the School Code quoted above, as a reason which fairly apprises the teacher of the alleged deficiency upon which the dismissal is based, and which is sufficiently specific for the teacher to be able to refute the charge. Wade v. Grantie City Community Unit School Dist. No. 9, 71 Ill. App. 2d 34, 36, 218 N.E.2d 19, _____ (1966).

Another Illinois appellate court found to be sufficiently specific a dismissal letter giving the reason "your inability to adequately supervise employees under your control." Howard v. Board of Educ. of Freeport School Dist. No. 145, 160 Ill. App. 3d 309, ____, 513 N.E.2d 545, 547 (1987). The court noted that this notice was sufficient because it "contained a specific reference to plaintiff's supervisory duties", and also because the

plaintiff had been advised of his specific performance deficiencies on numerous occasions. Id. at _____, 513 N.E.2d at 547-48. Here, Plaintiff's notice of dismissal made no reference to specific performance deficiencies; further, she had not been advised of any specific deficiencies prior to her dismissal. Therefore, the "reason" given Plaintiff contains none of the specificity required under Wade and Howard. The court finds that Plaintiff has sufficiently alleged that Defendants did not give Plaintiff sufficiently specific reasons for her termination, contrary to the requirements of the School Code. Plaintiff has sufficiently alleged 1) that she was under continued contractual service as of the last day of her employment, and 2) that she had a protectable property interest in employment.

Property and Liberty Interests in Employment

As just noted, Plaintiff has alleged that she was no longer a probationary teacher at the end

was no longer a probationary teacher at the end of her employment with Defendant Board. Therefore, Plaintiff has alleged that she possessed a property interest in continued employment as a teacher by virtue of the Illinois School Code, Ill. Rev. Stat. ch. 122, para, 24-11 (1989).

To show that she has been denied procedural due process, Plaintiff must allege that she was denied notice and/or an opportunity for a hearing, the two elements which are the essence of procedural due process. The court dismisses the portions of Plaintiff's complaint which allege that she was deprived of her property interest in employment without due process of law. However, the court grants Plaintiff leave to amend her complaint to allege specifically how she was denied notice and/or opportunity for a hearing regarding her dismissal.

Plaintiff also claims that Defendants deprived her of liberty interest in employment. The Seventh Circuit has held that only a

dismissal that is accompanied by serious public charges of misconduct preventing the employee from obtaining other employment of comparable responsibility may deprive the employee of his or her liberty interest in employment. Jungels v. Pierce, 825 F.2d 1127, 1131 (7th Cir. 1987).

Plaintiff's allegations regarding her liberty interest in employment do not state that the reason for her dismissal was made public, nor that the reason given was a serious charge of misconduct. Plaintiff alleges only that because Defendants dismissed her, she was unable to secure other employment as a teacher for a long period of time. Therefore, Plaintiff has not met the Jungels test for deprivation of liberty. Accordingly, the court dismisses the portions of Plaintiff's complaint that allege deprivation of liberty interest without due process of law. However, the court grants Plaintiff leave to amend her complaint in accordance with the test in Jungels v. Pierce, 825 F.2d 1127 (7th Cir. 1987).

Equal Protection

Defendants argue that Plaintiff has failed to state a Section 1983 claim for denial of equal protection. A person may state a claim for denial of equal protection by alleging that the government has infringed on a fundamental right. Supreme Court precedent clearly shows that a person's decisions regarding marriage and child bearing represent fundamental rights which are constitutionally protected from improper state infringement. Paul v. Davis, 424 U.S. 645, 713 (1976) ("matters relating to marriage, procreation, contraception, family relationships, and child rearing and education" are constitutionally protected); Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972) (the right of privacy includes the right of persons, whether married or single, to decide whether to bear children). This court has noted that without question, an unmarried woman has a substantive due process right to conceive and

raise her child without unwarranted state intrusion. Eckmann v. Board of Educ. of Hawthorn School Dist. No. 17, 636 F. Supp. 1214, 1218 (N.D. Ill. 1986). Therefore, Plaintiff, an unmarried woman who chose to bear and raise her child, has sufficiently pleaded a claim for denial of equal protection.

Violations of the Bill of Rights

Plaintiff has pleaded that Defendants have deprived her of her rights under the first, fourth, fifth, sixth, ninth, tenth, and fourteenth amendments. In her answer brief to Defendants' motion to dismiss, Plaintiff concedes that the fourth, sixth, and tenth amendments are inapplicable. Therefore, the court dismisses the portions of Plaintiff's complaint which allege a cause of action under the fourth, sixth, and tenth amendments to the U.S. Constitution.

Plaintiff's complaint does not identify in what particular way Defendants violated her

rights under the remaining constitutional amendments. Rather, Plaintiff states only generally that Defendants:

> have acted under color of State Law to wrongfully invade WHITMORE'S private life and otherwise to deprive her of her right to privacy free from governmental interference guaranteed by the 1st, 4th, 5th, 6th, 9th, 10th, and 14th Amendments to the Constitution of the United States, and by the Constitution of the State of Illinois.

Plaintiff's complaint at 6.

The only portion of the first amendment which the court can conceive of as applicable is the right "to petition the Government for a redress of grievances." U.S. Const. amend. I. Plaintiff has nowhere alleged that she requested and was denied the opportunity for a hearing concerning her dismissal. The first amendment has been found to confer a right to privacy in speech or association, but not in matters of freedom of choice in the matters of family and marriage. Thus, the court finds that Plaintiff has failed to state a claim under the first amendment. Accordingly, the

court dismisses those portions of Plaintiff's complaint which state a cause of action based on the first amendment to the U.S. Constitution. However, as noted on page 7 of this Order, the court grants Plaintiff leave to amend her complaint to allege that she requested and was denied the opportunity for a hearing regarding her termination.

Plaintiff has alleged that Defendants deprived her of a recognized substantive due process right: the right of an unmarried woman to bear and raise a child out of wedlock. The grand jury clause is the only clause in the fifth amendment which the Supreme Court has specifically held is not incorporated into the fourteenth amendment. Therefore, Plaintiff can properly allege that her substantive due process right emanates from the fifth and fourteenth amendments. Further, as described in the above section on Equal Protection, Plaintiff has properly pleaded a cause of action under the equal protection clause of the

fourteenth amendment.

Defendants argue that the ninth amendment is inapplicable because they dismissed Plaintiff on the basis of her teaching performance, and not because of her condition as a pregnant unmarried woman. This is an argument on the merits of Plaintiff's claim, and not an explanation of why the ninth amendment is inapplicable. For the purpose of this motion to dismiss, the court must assume that Plaintiff's allegations are true. If they are true, then Plaintiff has a cause of action under the ninth amendment right to familial privacy, as articulated in Griswold v. Connecticut, 381 U.S. 479, 484 (1965). Plaintiff asserts the right to decide the composition of her own family; in other words, her decision not to marry, and to raise a child.

Conspiracy under 42 U.S.C. Section 1985

Evidence of a conspiracy is rarely proven

directly, and is often proven by circumstantial evidence. Hampton v. Hanrahan, 600 F.2d 600, 621 (7th Cir. 1979), rev'd in part on other grounds, 446 U.S. 754 (1980). However, to survive a motion to dismiss, a claim of civil rights conspiracy must be sufficiently specific. Conclusory allegations alone are insufficient; if they are part of the claim, they must at least be accompanied by supporting factual allegations. Sparkman v. McFarlin, 601 F.2d 261, 265-66 (7th Cir. 1979) (Sprecher, J., concurring), citing Hansen v. Ahlgrimm, 520 F.2d 768 (7th Cir. 1975), and other Seventh Circuit cases so holding.

Plaintiff has alleged that Defendants acted in concert to deprive Plaintiff of equal protection through dismissing her. The concept of intracorporate immunity is inapplicable because Defendant Board has not shown that it is a corporation; because the other Defendants are named in their individual capacities; and because, even if Defendant Board were a

corporation, the individual employees of Defendant Board are named as co-conspirators. Cross v. General Motors Corp., 721 F.2d 1152, 1156 (8th Cir. 1983) cert. denied, 476 U.S. 1170 (1986). The court finds that Plaintiff's claim of civil rights conspiracy meets the requirements of the Seventh Circuit, as noted in Sparkman, and also the notice pleading requirements of the Federal Rules of Civil Procedure.

Title VII Damages

Count IV of Plaintiff's complaint seeks redress for violation of Title VII of the Civil Rights Act of 1964. Count IV seeks damages of $1,000,000.00 plus costs and attorney's fees, as well as reinstatement, backpay, and retroactive seniority. Defendants correctly note that Seventh Circuit precedent bars this court from awarding punitive or compensatory damages in Title VII cases. Brooms v. Regal Tube Co., 881 F.2d 412, 423 (7th Cir. 1989).

Therefore, the remedy which Plaintiff may seek for Title VII violations is limited to equitable relief.

The court dismisses the portion of Count IV of Plaintiff's complaint which seeks damages of $1,000,000.00. The court presumes that this sum represents Plaintiff's request for punitive or compensatory damages. The court grants Plaintiff leave to amend her complaint to demand the additional equitable relief of backpay. The court allows to stand as pleaded the portion of Count IV of Plaintiff's complaint which requests an injunction against Defendants. A prevailing party in a Title VII action may, in the court's discretion, be awarded attorney's fees and costs. Brooms, 881 F.2d at 425. Thus, the court allows to stand as pleaded the portion of Count IV of Plaintiff's complaint which requests attorney's fees and costs.

Intentional Infliction of Emotional Distress

Defendants argue that, as a matter of law,

Plaintiff has not stated a claim for intentional infliction of emotional distress, because 1) the alleged conduct is not extreme and outrageous, an essential element of the tort; and 2) the Illinois Workers' Compensation Act is the exclusive remedy for the tort. The court rejects both of these arguments.

Illinois law does recognize a cause of action for intentional infliction of emotional distress. To state a claim for this tort, the plaintiff must plead and prove that the defendant intentionally engaged in extreme and outrageous conduct which caused the plaintiff to suffer sever emotional distress. Clay v. Quartet Mfg. Co., 644 F. Supp. 56, 61 (N.D. Ill. 1986), citing Public Finance Corp. v. Davis, 66 Ill. 2d 85, 360 N.E.2d 765 (1976). In Illinois, the extreme and outrageous nature of the conduct is an essential element of the tort. Baily v. Unocal Corp., 700 F. Supp. 396, 399 (N.D. Ill, 1988). The conduct must be so

outrageous in character and so extreme in degree as to go beyond all possible bounds of decency. Public Finance, 66 Ill. 2d at 88, 360 N.E.2d at 767. The relationship of the parties is an important factor in determining whether certain conduct is extreme and outrageous. Bailey, 700 F.Supp. at 399. If the defendant has abused or exploited a relationship, a lower threshold of liability applies. Id., citing Bahr v. Ellis & Robertson, Inc., 1985 WL 3074 (N.D. Ill. 1985).

As noted earlier in this Order, an unmarried woman's decision to bear and raise her child is a fundamental right. If Defendants did, as Plaintiff alleges, terminate her because of her status as an unmarried pregnant woman, then that conduct might be found to be outrageous and extreme. Further, the nature of and circumstances surrounding the "frequent negative comments and sayings" of other employees of Defendant Board might rise to the level of extreme and outrageous conduct. In

any event, Plaintiff's allegations of intentional infliction of emotional distress are sufficiently pleaded to meet the liberal standard of notice pleading of the Federal Rules of Civil Procedure. Fed.R.Civ.P.8(a).

Defendants argue that the exclusivity provision of the Illinois Workers' Compensation Act, Ill. Rev. Stat. ch. 48, para. 138 - 138.30 (1989), bars Plaintiff's claim for intentional infliction of emotional distress. As support for this position Defendants cite Brooms v. Regal Tube Co., 881 F.2d 412, 426 (7th Cir. 1989). Because this is an issue of interpretation of a state statute, this court must follow the state's highest court's ruling on the issue. Less than three months ago, the Illinois Supreme Court spoke to this very question in Meerbrey v. Marshall Field & Co., No. 69652 (Ill. S. Ct. Nov. 30, 1990) (1990 WL 186385). The Meerbrey court held that "[t]he exclusivity provisions [of the Illinois Workers' Compensation Act] will not bar a

common law cause of action against an employer, however, for injuries which the employer or its alter ego intentionally inflicts upon an employee or which were commanded or expressly authorized by the employer." Id., slip op. at 7 (citing A. Larson, Law of Workmen's Compensation Section 68.21 (1988)).

In Count V of her complaint, Plaintiff has alleged that two intentional acts of Defendants caused her to suffer emotional distress: 1) Defendants terminated her employment; and 2) Defendants allowed commentary and dialogue about Plaintiff to continue. The first act is necessarily not "accidental," and the second act might be shown to be not "accidental" on Defendants' part. Plaintiff may seek to prove that Defendants "commanded or expressly authorized" the negative comments or sayings made about Plaintiff by other of Defendants' employees. Such a showing would render Defendants' actions intentional. Thus, the two alleged acts are not conclusively within the

exclusive purview of the Illinois Workers' Compensation Act. The court allows Count V of Plaintiff's complaint to stand as pleaded.

Qualified Immunity

Defendants argue that those among them named in their individual capacities are entitled to qualified immunity. The court rejects this argument. To establish personal, or individual, liability in a Section 1983 action, the plaintiff need show only that the officials, acting under color of state law, caused the deprivation of a federal right. Kentucky v. Graham, 473 U.S. 159, 166 (1985). If, as Plaintiff alleges, the individually named Defendants dismissed her based on her status as an unmarried pregnant woman, then they violated Plaintiff's substantive due process rights, and they would therefore have individual liability under Section 1983. Eckmann v. Board of Educ. of Hawthorn School Dist. No. 17, 636 F. Supp. 1214, 1225 (N.D.

Ill. 1986). Plaintiff has alleged that all Defendants violated a clearly established constitutional right: the right of an unmarried woman to bear and raise her child. Such an allegation means that the defense of qualified immunity is not available to the individually named defendants. Id. at 1227. Therefore, the court refuses to dismiss the individually named defendants from this action.

Punitive Damages

Punitive damages may be awarded against the individually named defendants if they showed reckless or callous disregard of, or indifference to, Plaintiff's federally protected right to bear and raise her child. Smith v. Wade, 461 U.S. 30, 56 (1983). Therefore, the court allows to stand as pleaded Plaintiff's claim for punitive damages against the individually named defendants.

Governmental entities, including school boards, are immune from punitive damages for

Section 1983 liability. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981). Further, the school board is a "local public entity" which, according to the Illinois Tort Immunity Act, is immune from punitive damages. Ill.Rev.Stat. ch. 85, para. 2-102 (1989). Therefore, the court dismisses all portions of Plaintiff's complaint which demand punitive damages against Defendant Board of Education.

Attorneys' Fees Under 42 U.S.C. Section 1988

As this Order has stated, Plaintiff has stated a cause of action against Defendants under 42 U.S.C. Sections 1983 and 1985 (1988). The prevailing party in a suit under either of these two sections may seek an award of attorneys' fees and costs. 42 U.S.C. Section 1988. Therefore, because the court is not dismissing Plaintiff's claims under Sections 1983 and 1985, it allows Plaintiff's claim for attorneys' fees and costs, under Section 1988, to stand as pleaded.

Conclusion

For the reasons set forth in this Order, the court grants in part and denies in part Defendants' motion to dismiss. The court dismisses the following portions of Plaintiff's complaint: allegations that Plaintiff was deprived of her liberty and property interests in employment without due process of law; allegations that Defendants violated Plaintiff's first amendment rights; the request for damages of $1,000,000.00; and the request for punitive damages against Defendant Board of Education. Further, the court grants Plaintiff leave to file an amended complaint within thirty days, in accordance with this Order, regarding the following allegations: allegations that Plaintiff was deprived of her liberty and property interests in employment without due process of law; allegations that Defendants violated Plaintiff's first amendment rights; and the court grants Plaintiff leave to

file an amended complaint to add a demand for the equitable relief of backpay. The court notes that the amended complaint should include all of Plaintiff's claims before the court. The amended complaint should incorporate the viable portions of Plaintiff's existing complaint with the amended portions which this Order describes.

ENTER:

STANLEY J. ROSZKOWSKI, JUDGE
UNITED STATES DISTRICT COURT

DATED: May 20, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

LINDA WHITMORE, Plaintiff,	)	
v.	)	No. 90-C-20143
BOARD OF EDUCATION OF DEKALB COMMUNITY SCHOOL DISTRICT NO. 428, JOHN REY, President of the Board of Education School District No. 428, Individually, BERNARD LOONEY, Principal, Individually, DR. JACK DEERE, District Superintendent, Individually, KEN KENNEDY, Assistant Principal, Individually, and ROBERT WILLIAMS, Assistant Superintendent, Individually,	)	Dated:March 18, 1992
Defendants.	)	

ORDER

Introduction

Linda Whitmore, plaintiff, filed a second amended complaint against defendants: the Board of Education of DeKalb Community School District No. 428; John Rey, president of the Board of Education; Bernard Looney, principal; Jack

Deere, district superintendent; Ken Kennedy, assistant principal; and Robert Williams, assistant superintendent. The second amended complaint contains five counts. All five counts arise from defendant's dismissal of plaintiff as a high school teacher. Count I is brought pursuant to 42 U.S.C. §1983 alleging defendants violated plaintiff's constitutional rights of equal protection nd both substantive and procedural due process. Count I seeks punitive damages based on the §1983 claim. Count III alleges a violation of 42 U.S.C. §1985. Count IV claims that defendants violated 42 U.S.C. §2000e (Title VII) by discharging plaintiff based on her sex. Count V alleges intentional infliction of emotional distress. Defendants filed a motion for summary judgment, and plaintiff filed a cross-motion for partial summary judgment.

Facts

Plaintiff is a female teacher who was hired to teach at DeKalb High School beginning the

fall semester of 1987. Plaintiff received two successive annual contracts which ran from the fall of 1987 to the end of school term in June of 1989. When plaintiff accepted employment, she was aware that a two-year probationary period existed.

Between November 1987 and March 1989, plaintiff was evaluated six times. Ken Kennedy, the assistant principal, evaluated plaintiff four of the six times, and Bernard Looney, the principal, evaluated plaintiff on the other two occasions. Plaintiff received a copy of an evaluation form and later attended a meeting which explained the evaluation process. The ratings on the form were the following: 4 (superior), 3 (excellent), 2 (satisfactory) and 1 (unsatisfactory). According to Jack Deere, the district superintendent, the process was inflated so that a satisfactory rating actually meant that a teacher was not doing well. Each of plaintiff's six evaluations consisted of a pre-evaluation conference, a classroom

observation and a post-observation conference.

During several of the post-observation conferences, plaintiff was informed of a perceived lack of enthusiasm. After the second evaluation, a comment under the heading "summative rating" stated, "Due to improvement in delivery and planning I feel that a rating in the high satisfactory range is appropriate at this time, with the continued improvement a future excellent rating is a definite possibility." (Emphasis in original.) After plaintiff's third evaluation, she was rehired for the next academic year. After the fifth evaluation, the summative rating comment stated, "Linda continues to strive for improvement. Based upon this class observation, an excellent rating would be appropriate." Following the sixth and final evaluation, the summative rating comment stated, "Satisfactory to Excellent Rating."

On March 23, 1989, at the post-observation conference of the sixth evaluation, Looney told

plaintiff that he would not recommend that she be retained and given tenure because she did not meet the Board's expectations. Plaintiff received a letter dated March 20, 1989, notifying her that she was dismissed from her duties as a school teacher effective the last day of the school term. The letter stated, "This action is being taken because the performance of your duties has failed to meet the District's expectations." In addition to plaintiff, another teacher, Sandy Larkin, was not recommend for tenure, and Larkin's final evaluation was better than plaintiff's.

In June 1988, plaintiff became pregnant as a result of a rape. In November 1988, plaintiff informed Looney of the rape and pregnancy. After receiving notice of her termination, plaintiff and her mother met with Deere. At the meeting, Deere referred to plaintiff's pregnancy and said he had empathy and sympathy for plaintiff's mother. Plaintiff had personal knowledge of only one negative comment regarding

her pregnancy and that comment was made by Ms. Helen Farley who is not a defendant in this case. The statement plaintiff alleges that Helen Farley made was, "That there was something wrong with that special education staff and all of its promiscuous teachers, they got one unmarried and pregnant and another running around." Plaintiff never head any defendant make a negative comment about her pregnancy, and no defendant suggested that she seek an abortion, resign before her pregnancy showed or that she give up her child for adoption. In March 1989, Ester Solar, who was also pregnant at the time, was given tenure.

Contentions

Defendants contend as to Count I that they followed the proper procedures for terminating plaintiff under the Illinois statute, Ill.Rev. Stat. ch. 122, par. 24-11 (1989). By following the proper statutory procedures, defendants claim that plaintiff had no property interest under the Fourteenth Amendment in remaining

employed. Defendants also contend that there is no evidence showing a violation of plaintiff's other constitutional rights, and there is no evidence of intentional discrimination so as to violate the equal protection clause of the Fourteenth Amendment. As to plaintiff's §1985 claim in Count III, defendants contend that it is barred by the intracorporate conspiracy doctrine. Defendants also contend that plaintiff has failed to meet her prima facie case under her Title VII claim in Count IV. Finally, defendants contend that plaintiff in Count V has failed to show that defendants' conduct was extreme and outrageous as required for an intentional infliction of emotional distress claim.

In plaintiff's cross-motion for partial summary judgment, she contends that she was a tenured teacher as a matter of law because defendants failed to comply with the statutory requirements; namely, they failed to give her a "specific reason" for her dismissal. As a

tenured teacher, plaintiff contends that she was entitled to certain protections under the Fourteenth Amendment.

Discussion

This court will not grant any summary judgment motion unless all of the pleadings and supporting documents, if any, indicate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 147 (1986); Fitzsimmons v. Best, 528 F.2d 692, 694 (7th Cir. 1976). Facts are material so as to preclude summary judgment if they might affect the outcome of the suit under the governing law. Anderson, 477 U.S. at 248. A dispute about a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson, 477 U.S. at 248. However, the district court is not required to evaluate every conceivable inference that can be drawn from evidentiary matters, but

only reasonable ones. Spring v. Sheboygan Area School District, 865 F.2d 883, 886 (7th Cir. 1989). To demonstrate a genuine issue of material fact in opposition to a motion for summary judgment, the non-moving party must do more than raise a "metaphysical doubt" as to the material facts. Matsushita Electric Industrial Co., v. Zenith Radio Co., 475 U.S. 574, 586 (1986). The mere existence of a scintilla of evidence in support of a party's position is insufficient; there must be evidence on which the jury could reasonably find for the party. Anderson, 477 U. S. at 252. The inquiry to be made on a motion for summary judgment is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. Anderson, 477 U. S. at 251-52.

Count I[4]

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[4] Included in Count I of plaintiff's second amended complaint are allegations which are legally and factually incorrect. For example, plaintiff has alleged that defendants, a local government body and its employees,

Plaintiff's main thrust in Count I is that she was a tenured teacher. She contends she was dismissed contrary to the Illinois statute governing such action because defendants failed to give plaintiff a specific reason for her dismissal. See Ill. Rev. Stat., ch. 122, par. 24-11 (1989). Plaintiff contends that as a tenured teacher she had a property interest

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violated the Fifth Amendment's due process clause. Without belaboring the point, it is noted that the Fifth Amendment's due process clause applies to the Federal government. See Barron v. Baltimore, 32 U.S. 243 (1833). Also included in Count I are allegations that defendants violated the Illinois constitution; however, claims under §1983 must be based on deprivations of rights secured by the Federal Constitution or Federal laws. Flagg Brothers, Inc. v. Brooks, 436 U. S. 149, 155 (1978); Tavarez v. O'Malley, 826 F.2d 671, 677 (7th Cir. 1987). These allegations are so contrary to clearly established law that they need no discussion.

Further, some of plaintiff's factual allegations in Count I are contrary to plaintiff's own deposition testimony. Plaintiff alleged that she was "unable to obtain employment for a long period of time." However, plaintiff testified in her deposition that during the summer of 1989 she held the same teaching position which she had held for every summer for 16 years, and she also started working as a special education teacher in August 1989.

which could not be deprived without due process. Defendants contend that plaintiff was dismissed in accordance with the Illinois statute, and therefore, she had no property interest as a nontenured teacher.

Property interests are not create by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972). In this cause of action, plaintiff attempts to create a property interest under §24-11 of the Illinois School Code (Code). Ill. Rev. Stat., ch. 122, par. 24-11 (1989). If plaintiff was a tenured teacher, she would be entitled to the protections of the Fourteenth Amendment. However, the Seventh Circuit has held that under §24-11 of the Code nontenured teachers' claims of entitlement to their positions are insufficient to constitute a property interest within the meaning of the

Fourteenth Amendment. Miller v. School District Number 167, Cook County, Illinois, 500 F.2d 711, 712 (7th Cir. 1974); see also Austin v. Board of Education of Georgetown Community Unit School District No. 3, 562 F.2d 446, 452 (7th Cir. 1977). Thus, plaintiff's entire property interest is premised on whether she was a tenured teacher because she was not properly dismissed according to §24-11 of the Code.

Section 24-11 of the Code provides the following:

> "Any teacher who has been employed in any district as a full-time teacher for a probationary period of 2 consecutive school terms shall enter upon contractual continued service unless given written notice of dismissal stating the specific reason therefor, by certified mail, return receipt required by the employing board at least 60 days before the end of such period."

Ill. Rev. Stat., ch. 122, par. 24-11 (1989).

The term "specific reason" means that the reason "must fairly apprise the teacher of the alleged deficiency upon which the employer-school board bases its dismissal action, and with sufficient specificity to enable the teacher to refute the charge." Howard v. Board of Education of Freeport, 160 Ill.App.3d 309, 513 N.E.2d 545, 547 (1987). The purpose of the specificity requirement is to prevent arbitrary dismissals which state vague or nebulous reasons or no reasons at all, and to compel school boards to state the actual reason for the dismissal. Burns v. Board of Education of Fairfield School District No. 112 of Wayne County, 47 Ill.App.3d 589, 362 N.E.2d 353, 355 (1977). Prior evaluations before the dismissal which give notice of perceived deficiencies may help fulfill the statutory requirement of a specific reason. See Howard, 160 Ill.App.3d at _____, 513 N.E.2d at 548.

Based on the prior evaluations of plaintiff and the notice she received in those

evaluations of the perceived deficiencies, defendants met their statutory requirement that plaintiff receive a specific reason for her dismissal. Although the March 20, 1989, letter merely stated that plaintiff was dismissed because she "failed to meet the District's expectations," she was repeatedly told during her evaluations that her lack of enthusiasm was a problem which needed to be corrected. When considered in conjunction with the prior evaluations, the March 20, 1989, letter fairly apprised plaintiff as to why she was being dismissed and fulfilled the purpose of the statute. This is sufficient to meet the "specific reason" requirement of §24-11. See Howard, 160 Ill.App.3d at ____, 513 N.E.2d at 548.

Because plaintiff was dismissed in accordance with the Illinois statute, plaintiff has no property interest protected by the Fourteenth Amendment. See Miller, 500 F.2d at 712; see also Roth, 408 U.S. at 578. Therefore,

plaintiff's cross-motion for partial summary judgment is denied.

Count I also alleges other violations of plaintiff's constitutional rights including what appears to be a claim that she was deprived of a liberty interest without due process of law in violation of the Fourteenth Amendment, a claim that she was deprived of substantive due process and a claim that she was denied equal protection under the Fourteenth Amendment.

As to the contention that she was deprived of a liberty interest without due process of law, the general rule is that for a person to be deprived of a liberty interest in continued employment the discharge must affect the reputation, good name, honor or integrity of the person. See Roth, 408 U. S. at 573. However, in some circumstances, a combination of stigma to reputation plus failure to rehire may state a claim under 42 U.S.C. §1983. Austin, 562 F.2d at 450. although some stigma

attaches whenever an employee is dismissed, this type of harm does not infringe on an employee's liberty interests. Ratliff v. City of Milwaukee, 795, F.2d 612, 625 (7th Cir. 1986). Here, plaintiff was dismissed because she did not meet the expectations of defendants based on the lack of enthusiasm. The dismissal was not based on allegations of misconduct such as taking indecent liberties with a minor. Cf. Austin, 562 F.2d at 450. The failure to rehire plaintiff did not deprive her of a protected liberty interest.

As to plaintiff's substantive due process claim, because there was no violation of plaintiff's procedural due process rights to property and liberty, plaintiff's substantive due process claim must also fail. See Stebbins v. Weaver, 537 F.2d 939, 942 (7th Cir. 1976).

Next, in analyzing plaintiff's equal protection claim, it must first be determined whether the claim involves a suspect class or a fundamental right. Pryor v. Brennan, 914

F.2d 921, 923 (7th Cir. 1990). It appears in Count I that plaintiff is claiming both that she is member of a suspect class, her sex, and that the claim involves a fundamental right, her decision to bear and rear a child.

To establish a prima facie case of discrimination in violation of the equal protection clause, a plaintiff is required to show that he or she is a member of a protected class, that he or she is otherwise similarly situated to members of the unprotected class and that he or she was treated differently from members of the unprotected class. McMillian v. Svetanoff, 878 F.2d 186, 189 (7th Cir. 1989). In showing a prima facie violation of equal protection, the plaintiff must show both differential treatment and discriminatory intent. Sims v. Mulcahy, 902 F.2d 524, 539 (7th Cir. 1990).

Plaintiff has failed to establish a prima facie case of an equal protection violation under §1983 in order to prevent summary

judgment. See Randle v. LaSalle Telecommunications, Inc., 876 F.2d 563, 568 (7th Cir. 1989). Plaintiff has not produced any showing that she was intentionally treated differently because of her sex or her pregnancy. In fact, another pregnant women was given tenure at the time plaintiff received notice that she would not be given tenure.

For the foregoing reasons, as to Count I of plaintiff's second amended complaint, defendant's motion for summary judgment is granted and plaintiff's cross-motion for partial summary judgment is denied.

Count II

Because Count II requests punitive damages based on Count I and defendants' motion for summary judgment as to Count I is granted and plaintiff's cross-motion for partial summary judgment is denied, defendants' motion for summary judgment as to Count II is granted.

Count III

Count III of plaintiff's second amended

complaint alleges a violation of 42 U.S.C. §1985(3). Defendants contend that such a claim is barred by the intracorporate conspiracy doctrine as outline in Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972).

Although there is a split among the circuits, see Travis v. Gary Community Mental Health Center, 921 F.2d 108, 109 (7th Cir. 1990), the Seventh Circuit applies the intracorporate conspiracy doctrine to §1985 claims, see e.g., Dombrowski v. Dowling, 459 F.2d 190, 196 (7th Cir. 1972); Travis, 921 F.2d at 110. The rationale is that an entity is able to act only through its employees and agents and to hold that it can conspire through its employees and agents is to say that it is conspiring with itself. Lac du Flambeau Band v. Stop Treaty Abuse -- Wisconsin, Inc., 759 F.Supp. 1339, 1351 (W.D. Wis. 1991). The intracorporate conspiracy doctrine has been used to grant summary judgment for defendants in a §1985(3) claim who were all agents or employees of the

same school board. Hull v. Cuyahoga Valley Board of Education, 926 F.2d 505, 509-10 (6th Cir. 1991) cert denied 111 S.Ct. 2917 (1991).

In this case, because all defendants are employees of the Board, the intracorporate conspiracy doctrine applies, and defendants' motion for summary judgment is granted.

Count IV

Count IV of plaintiff's second amended complaint alleges that defendants violated 42 U.S.C. §2000e (Title VII0 because they intentionally dismissed plaintiff because of her sex, because she was pregnant and because she was unmarried.

Initially, defendants contend that marital status is not a protected class under Title VII. It should be noted that this case does not involve a no-marriage rule, cf. EEOC v. Delta Air Lines, Inc., 578 F.2d 115 (5th Cir. 1978); Stroud v. Delta Airlines, Inc., 544 F.2d 892 (5th Cir. 1977); Sprogis v. United Airlines Inc., 444 F.2d 1194 (7th Cir. 1971), or a rule

which forbids or restricts the employment of married women but which is not applicable to married men, cf. 29 CFR §1604.4(a). Rather, this cause of action involves the dismissal of a pregnant woman who happens to be unmarried.

In determining the meaning of a statute, a federal court must first look to the plain language of the statute before looking beyond the words themselves. Oneida Tribe of Indians v. Wisconsin, 951 F.2d 757, 760-61 (7th Cir. 1991). Discrimination based on marriage is not forbidden by the language of Title VII. C.Antieau, Federal Civil Rights Acts Civil Practice §402 (2d Ed. 1980). The clear language of the statute does not enumerate marital status as a protected class, and discrimination based on marital status standing alone does not violate the protected classification of sex.

Because statutory interpretation is a question of law, United States v. Powell, 929 F.2d 1190, 1193 (7th Cir. 1991), defendants'

motion for summary judgment is granted as to the relief required in paragraph 29(b) of Count IV. However, plaintiff's claims of discrimination based on her sex must be addressed.

The basic allocation of burdens and presentation of proof in a Title VII individual disparate treatment case based on sex was articulated in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). A plaintiff has the burden of providing by a preponderance of the evidence a prima facie case of discrimination; if the plaintiff succeeds in proving a prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection; and if the defendant meets this burden, the plaintiff must prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. Burdine, 450 U.S. at 252-

53.

To show a prima facie case, the plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified but was rejected under circumstances which give rise to an inference of unlawful discrimination. Burdine, 450 U.S. at 253. Although the burden of establishing a prima facie case of disparate treatment is not onerous, Burdine, 450 U.S. at 253, any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act. International Brotherhood of teamsters v. United States, 431 U.S. 324, 358 (1977). A plaintiff must demonstrate at least that the action did not result from the two most common legitimate reasons on which an employer might rely: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought. Teamsters, 431 U.S. at 358 n.

44. Because facts will vary in Title VII cases, what is required to show a prima facie case will also vary. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n. 13 (1973).

Here, defendants argue that because plaintiff has failed to meet her prima facie case, summary judgment should be granted. See Randle, 876 F.2d at 568. Plaintiff has not met her burden of showing a prima facie case of disparate treatment. Plaintiff has only shown that she was a pregnant woman who did not receive tenure. Plaintiff has not shown by a preponderance of the evidence that she was rejected under circumstances that give rise to an inference of unlawful discrimination. In fact, Ester Solar, who was pregnant at the time of plaintiff's notice of dismissal, was given tenure. Further, plaintiff's final evaluation was the worst of all seven second-year probationary teachers at DeKalb High School in 1988-89.

Count V

Count V of plaintiff's second amended complaint alleges intentional infliction of severe emotional distress. Plaintiff alleges that the dismissal, "in and of itself," resulted in severe emotional distress and that certain employees made comments about plaintiff "[a]s a direct result of said dismissal." Defendants essentially claim that the facts alleged in the second-amended complaint and plaintiff's deposition do not rise to the level necessary to support such a claim.[5]

To state a cause of action for intentional infliction of emotional distress, the plaintiff must establish the following: (1) the defendant's conduct was extreme and outrageous;

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[5] Although a Federal District Court can grant a motion for summary judgment in favor of a defendant on a claim of intentional infliction of emotional distress, see, e.g., Bast v. Ford Motor Credit Corp., 631 F.2d 508, 511 (7th Cir. 1980), a motion to dismiss would be a more appropriate procedure, see Miller v. Equitable Life Assurance Society of the United States, 181 Ill.App.3d 954, 537 N.E.2d 887, 889 (1st Dist. 1989).

(2) the emotional distress suffered by the plaintiff was severe; and (3) the defendant knew that severe emotional distress was certain or substantially certain to result from such conduct. McGrath v. Fahey, 126 Ill.2d 78, 533 N.E.2d 806, 809 (1988). Defendant's conduct must be so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and the distress must be so severe that no reasonable man could be expected to endure it. Public Finance Corp. v. Davis, 66 Ill.2d 85, 360 N.E.2d 765, 767 (1976). The slight hurts that individuals must endure in a complex society do not constitute extreme and outrageous conduct. Douglas v. American Information Technologies Corp., 877 F.2d 565, 571 (7th Cir. 1989).

It cannot be said that the dismissal of plaintiff, standing alone, is enough to show intentional infliction of emotional distress, and the facts presented are so one-sided that summary judgment must be granted. As the

comments made by other employees, plaintiff only has personal knowledge of a statement of Helen Farley and that statement does not show intentional infliction of emotional distress as a matter of law. Therefore, defendants' motion for summary judgment is granted as to Count V.

Conclusion

For the reasons mentioned above, defendants' motion for summary judgment is granted, and plaintiff's cross-motion for partial summary judgment on Count I is denied.

ENTER:

PHILIP G. REINHARD, JUDGE
UNITED STATES DISTRICT COURT

DATED: March 18, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

LINDA WHITMORE, Plaintiff,	)	
v.	)	No. 90-C-20143
BOARD OF EDUCATION OF DEKALB COMMUNITY SCHOOL DISTRICT NO. 428, JOHN REY, President of the Board of Education School District No. 428, Individually, BERNARD LOONEY, Principal, Individually, DR. JACK DEERE, District Superintendent, Individually, KEN KENNEDY, Assistant Principal, Individually, and ROBERT WILLIAMS, Assistant Superintendent, Individually,	)	Dated:June 9, 1992
Defendants.	)	

ORDER

On March 18, 1992, the court granted defendant's motion for summary judgment and denied plaintiff's cross motion for partial summary judgment. On April 15, 1992, this court granted plaintiff's motion for leave to file a motion to reconsider. Plaintiff's

motion is brought pursuant to Fed.R.Civ.P. 60(b)(1), (2) and (6).

Rule 60(b), in relevant part states, "On motion and upon terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial . . . or (6) any other reason justifying relief from the operation of the judgment." Relief from a judgment under Fed. R. Civ. P. 60(b) is an extraordinary remedy and is granted only in exceptional circumstances. Reinsurance Co. v. Administratia Asigurarilor, 902 F.2d 1275, 1277 (7th Cir. 1990). A party cannot use Fed.R.Civ.P. 60(b) as a substitute for appeal. Andrews v. Heinold Commodities Inc., 771 F.2d 184, 188 (7th Cir. 1985).

After careful review, plaintiff's motion states no grounds for relief under Fed.R.Civ.P.

60(b). No excusable neglect, newly discovered evidence or other reason justifying relief under Fed. R. Civ.P. 60(b) is presented. Plaintiff's motion is denied.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 8, 1993.

Before

Hon. JOHN L. COFFEY, Circuit Judge

Hon. KENNETH F. RIPPLE, Circuit Judge

Hon. JESSE E. ESCHBACH, Senior Circuit Judge

LINDA WHITMORE, Plaintiff-Appellant,	]	Appeal from the United States District Court for the Northern District of Illinois, Western Division.
No. 92-2442 v.	]	
BOARD OF EDUCATION OF DEKALB COMMUNITY SCHOOL DISTRICT NO. 428, individually, BERNARD LOONEY, Principal, individually, et al.,	]	No. 90 C 20143
	]	Philip G. Reinhard, Judge.
Defendants-Appellees.	]	

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed by plaintiff-appellant on August 18, 1993, no judge in active service has requested a vote thereon, and all the judges on the original panel have voted to deny the petition.

Accordingly,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing en banc be, and the same is hereby, DENIED.

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 21 -- Civil Rights
Subchapter I -- Generally

Section 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Section 1985. Conspiracy to interfere with civil rights

(1) Preventing officer from performing duties

If two or more persons in any State or

Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and

truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment lawfully assented to be him, or of his being or having been such juror; or is two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

United States Code Annotated
Title 5. Government Organization and Employees

Part III -- Employees
Subpart E -- Attendance and Leave
Chapter 63 -- Leave
Subchapter V -- Family and Medical Leave

Section 6382. Leave requirement

(a)(1) Subject to section 6383, an employee shall be entitled to a total of 12 administrative workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of the son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the

functions of the employee's position.

(2) The entitlement to leave under subparagraph (A) or (B) of paragraph (1) based on the birth or placement of a son or daughter shall expire at the end of the 12-month period beginning on the date of such birth or placement.

(b)(1) Leave under subparagraph (A) or (B) of subsection (a)(1) shall not be taken by an employee intermittently or on a reduced leave schedule unless the employee and the employing agency of the employee agree otherwise. Subject to paragraph (2), subsection (e)(2), and section 6383(b)(5), leave under subparagraph (C) or (D) of subsection (a)(1) may be taken intermittently or on a reduced leave schedule when medically necessary. In the case of an employee who takes leave intermittently or on as reduced leave schedule pursuant to this paragraph, any hours of leave so taken by such employee shall be subtracted from the total amount of leave remaining

available to such employee under subsection (a), for purposes of the 12-month period involved, on an hour-for-hour basis.

(2) If an employee requests intermittent leave, or leave on a reduced leave schedule, under subparagraph (C) or (D) of subsection (a)(1), that is foreseeable based on planned medical treatment, the employing agency may require such employee to transfer temporarily to an available alternative position offered by the employing agency for which the employee is qualified and that --

(A) has equivalent pay and benefits; and

(B) better accommodates recurring periods of leave than the regular employment position of the employee.

(C) Except as provided in subsection (d), leave granted under subsection (a) shall be leave without pay.

(D) An employee may elect to substitute for leave under subparagraph (A), (B), (C), or (D) of subsection (a)(1) any of the employee's

accrued or accumulated annual or sick leave under subchapter I for any part of the 12-week period of leave under such subsection, except that nothing in this subchapter shall require an employing agency to provide paid sick leave in any situation in which such employing agency would not normally provide any such paid leave.

(E)(1) In any case in which the necessity for leave under subparagraph (A) or (B) of subsection (a)(1) is foreseeable based on an expected birth or placement, the employee shall provide the employing agency with not less than 30 days' notice, before the date the leave is to begin, of the employee's birth or placement requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(2) In any case in which the necessity for leave under subparagraph (C) or (D) of subsection (a)(1) is foreseeable based on planned medical treatment, the employee- (A) shall make a reasonable effort to schedule the

treatment so as not to disrupt unduly the operations of the employing agency, subject to the approval of the health care provider of the employee or the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate; and

(B) shall provide the employing agency with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 21 -- Civil Rights

Section 2000e-2. Discrimination because of race, color, religion, sex or national origin.

(a) Employers. It shall be an unlawful employment practice for an employer --

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

United States Constitution
Amendment I

Congress shall make no law respecting an

establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Rules of Civil Procedure
Rule 60

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment...

APPENDIX A

Appellate Opinion of August 4, 1993.	A - 1
Order of Judge Roszkowski	A - 12
Amended Order of Judge Roszkowski	A - 42
Summary Judgment of Judge Reinhard	A - 72
Denial of Motion to Reconsider	A - 99
Order Denying Rehearing of Appellate Opinion	A - 102
United States Code Annotated Title 42, Chapter 21, Section 1983	A - 104
United States Code Annotated Title 42, Chapter 21, Section 1985	A - 104
United States Code Annotated Title 5, Section 6382	A - 107
United States Code Annotated Title 42, Chapter 21, Section 2000e-2	A - 112
United States Constitution Amendment I	A - 113
United States Constitution Amendment V	A - 113
United States Constitution Amendment IX	A - 114
United States Constitution Amendment XIV	A - 114
Federal Rules of Civil Procedure Rule 60(b)	A - 115